



May 10, 2002

Ms. Elizabeth G. Neally
Roerig, Oliveira, & Fisher, L.L.P.
855 West Price Road, Suite 9
Brownsville, Texas 78520-8786

OR2002-2490

Dear Ms. Neally:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163343.

The Brownsville Independent School District (the "district"), which you represent, received a request for copies of documentation or warning letters pertaining to a specified former teacher, as well as a copy of that former teacher's resignation letter. You state, and provide documentation showing, that you have provided the requestor with the responsive resignation letter. You claim, however, that the submitted information is excepted from disclosure pursuant to section 552.102 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code.¹ See *Industrial Found.*, 540 S.W.2d at 683-85. Accordingly, we address your section 552.102 claim under section 552.101 in conjunction with the common-law right to privacy.

Information is protected from disclosure by the common-law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by the common-law right to privacy.

person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* We note that the information at issue relates solely to the work behavior and job performance of the former teacher. Since there is a legitimate public interest in the work behavior of public employees and the conditions for their continued employment, the district may not withhold any portion of the information from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. *See Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in having access to information concerning job performance of governmental employees), 444 (1986) (public has legitimate interest in knowing reasons for public employee's demotion, dismissal, or resignation), 423 at 2 (1984) (scope of public employee privacy is narrow).*

However, we note that the social security number of the former teacher that is contained within the information may be excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(1).* However, information subject to section 552.117(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* Accordingly, the district must withhold the former teacher's social security number from disclosure pursuant to section 552.117(1), if he requested that this number be kept confidential under section 552.024 prior to the district's receipt of this request for information.

If the former teacher did not elect to withhold his social security number from disclosure as prescribed by section 552.024, it may nevertheless be confidential under federal law. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994).* Section 552.101 also encompasses information protected from disclosure by other statutes. These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the former teacher's social security number is confidential under section 405(c)(2)(C)(viii)(I). We caution the district, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing this social security number, the district should ensure that it was not obtained and is not maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

We also note that some of the information is subject to the Family Educational Rights and Privacy Act ("FERPA"). FERPA provides that no federal funds will be made available

under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *See id.* § 1232g(a)(4)(A).

Information must be withheld from disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). This includes information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA as they make identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments). Based on our review of the information, we conclude that some of this information constitutes personally identifiable information contained in a student's education records. Accordingly, we conclude that the district must withhold from disclosure the information that we have marked, consisting of a student's handwritten notes, pursuant to FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978).

In summary, the district must withhold the former teacher's social security number from disclosure pursuant to section 552.117(1), if he requested that this number be kept confidential under section 552.024 prior to the district's receipt of this request for information. If no such election was made, the social security number may nevertheless be confidential under federal law. The district must withhold from disclosure the information that we have marked pursuant to FERPA. The district must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

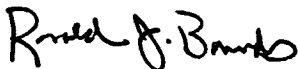
statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 163343

Enc. Marked documents

cc: Mr. Robert Rocha
670 North Central Avenue
Brownsville, Texas 78521
(w/o enclosures)